

This letter discusses basic principles of nexus. See 35 ILCS 105/1 et seq., 35 ILCS 120/1 et seq., and 86 Ill. Adm. Code 150.201. (This is a GIL.)

June 26, 2007

Dear Xxxxx:

This letter is in response to your letter dated February 9, 2007, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I. Significant Sales and Use Tax Law Developments in 2006.

Please identify and explain any legal developments in 2006 in your state that significantly affect the administration and enforcement of your jurisdiction's sales and use tax laws. For each development you have identified, please include a brief description and a citation to the relevant document in the appropriate space below.

Legislation enacted in 2006:

Regulations adopted in 2006:

Judicial opinions released in 2006:

Administrative pronouncements issued in 2006:

II. Sales and Use Tax Nexus Creating Activities.

Please check 'yes' or 'no' to indicate whether each of the following activities or relationships performed by an out-of-state corporation would, by itself, create substantial nexus with your state for purposes of triggering the imposition of sales or use tax collection requirements on the corporation. When determining whether the listed activity/relationship would create substantial nexus, assume that each item is the only activity/relationship the corporation has in your state. Also assume that the out-of-state corporation has no property or employees located in our state.

A 'yes' response means that an out-of-state corporation's performance of the listed activity/relationship would, by itself, create substantial nexus and trigger the imposition of sales or use tax collection requirements on the corporation. A 'no' response means that an out-of-state corporation's performance of the listed activity/relationship would not, by itself, trigger nexus for purposes of your state's sales or use tax.

For the questions that you believe require more than a 'yes' or 'no' answer, please set forth in the comments section the factors that your state would consider in making a nexus determination.

The corporation:

YES NO

1. sells tangible personal property to residents in your state from outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or otherwise) and has an employee visit your state four or more times during the year
2. sells tangible personal property to residents in your state from outside the state and authorizes an employee or third party (e.g., sales representative, independent contractor, or affiliated company) to solicit sales in the state
3. authorizes an employee or third party (e.g., independent contractor, affiliated company, or other representative) to install, deliver, service, or repair merchandise in your state
4. uses an employee or third party (e.g., independent contractor, affiliated company, or other representative) to investigate, handle or resolve customer issues, provide training or technical assistance, or otherwise provide customer service to customers in your state
5. delivers merchandise to customers in your state in company-owned vehicles or by means other than common carrier or the U.S. Postal Service
6. attends or participates in trade shows held in your state, and

- (a) makes no sales and takes no orders at the trade show
 - (b) makes sales and/or accepts orders at the trade show
 - (c) limits trade show activities in the state to no more than five days annually
7. sells tangible personal property while temporarily located in your state for up to three days
 8. hires independent contractors to perform warranty or repair services on tangible personal property located in your state
 9. hires an unaffiliated printer in the state and stores raw materials or finished goods at the in-state printer's plant
 10. hires an unrelated call center or fulfillment center located in your state to process telephone and electronic orders that primarily derive from out-of-state customers
 11. issues credit cards to customers who reside in your state
 12. enters into an advertising contract with a cable station, radio station, print publication or electronic publication that is located in your state
 13. holds a certificate of authority to conduct business in the state, or is otherwise registered with the Secretary of State or any state regulatory agency in your state
 14. collects delinquent accounts using a collection agency in your state or hires attorneys or other third parties to file collection suits in courts in your state
 15. uses a company in your state to drop-ship merchandise to customers
 16. is affiliated with an entity that sells tangible personal property or services to customers in your state, and
 - (a) the in-state affiliate sells similar merchandise and uses common trade names, trademarks or logos
 - (b) uses the in-state affiliate to accept returns, take orders, perform customer service or distribute advertising materials on its behalf
 - (c) sells tangible personal property over the Internet or by catalog and has an affiliated company that operates a retail store in your state
 17. has employees or representatives occasionally enter the state to meet with in-state suppliers of goods or services
 18. sells tangible personal property over the Internet and operates a Web site which is maintained on a server located in your state
 19. uses an Internet link or enters into an affiliation linking arrangement with a third party that:
 - (a) is located in your state
 - (b) maintains a Web site on a server that is located in your state

Comments:

Please return the completed Questionnaire to PERSON.

DEPARTMENT'S RESPONSE:

Legislation enacted in 2006:

Public Act 94-781 related to intermodal terminal facilities

Public Act 94-1002 related to sunsets of certain exemptions

Regulations adopted in 2006:

Changes related to electronic payment of taxes:

86 Ill. Adm. Code 750.600

86 Ill. Adm. Code 750.700

86 Ill. Adm. Code 750.900

86 Ill. Adm. Code 760.220

86 Ill. Adm. Code 760.240

86 Ill. Adm. Code 770.150

Judicial Opinions released in 2006:

A. Appellate Court

1. United Airlines, Inc. v. Department of Revenue, 367 Ill. App. 3d 42 (1st Dist. July 27, 2006)

- Held that jet fuel was special fuel and did not qualify for temporary reduction in use tax rate on purchases of motor fuel.

2. Honeywell International, Inc. v. Department of Revenue, 366 Ill. App. 3d 187 (1st Dist. May 5, 2006)

- Held that installation of aeronautics on airplanes did not constitute delivery for purposes of interstate commerce exemption from service occupation tax when retrofitted airplanes were flown out-of-state upon completion despite fact that parts were accepted upon inspection in Illinois in order to obtain airworthiness certificate.

3. Belleville Kawasaki/Suzuki, Inc. v. Department of Revenue, No. 5-04-0464, Order (5th Dist. May 11, 2006)

- Affirmed administrative decision that ATV sales to Missouri residents in absence of issuance of drive-away permits or out-of-state registration transfer certificates did not qualify for interstate commerce exemption to retailer's occupation tax.

4. State ex rel. Beeler, Schad and Diamond, P.C. v. Target Corp., 367 Ill. App. 3d 860 (1st Dist. Aug. 25, 2006)

- Held that qui tam action brought against on-line retailer for failure to collect use tax properly dismissed where relator was not the original source of the

information alleged in its complaint, which was substantially similar to that publicly disclosed in various media reports.

5. State ex rel. Beeler, Schad and Diamond v. Burlington Coat Factory Warehouse Corp., 369 Ill. App. 3d 507 (1st Dist. Dec. 6, 2006)

- Attorney General has absolute discretion to dismiss qui tam case filed against on-line retailer for failure to collect use tax upon determining lack of nexus with Illinois.

B. Circuit Court

1. Advanced On-Site Concrete, Inc. v. Department of Revenue, No. 06 CH 377 (transferred to Law Division), Memorandum Decision and Judgment (Cook County Oct. 30, 2006), appeal filed Nov. 28, 2006

- Affirmed administrative decision that parts not eligible for MM&E exemption from use tax where records were insufficient to show that parts were installed on exempt equipment
- Affirmed administrative decision that special charges for evening, weekend and overtime delivery of ready mix cement, which were based on additional costs incurred, were included in gross receipts subject to retailers' occupation tax.
- Affirmed administrative decision that taxpayer's belief that delivery was a nontaxable service did not constitute reasonable cause to abate penalties.
- Held that imposition of double interest and penalties pursuant the Taxpayer Delinquency and Amnesty Act did not violate due process or uniformity in that the penalty for failing to participate in the amnesty program was rationally related to the legislative purpose of raising revenue.
- Held that imposition of double interest and penalties pursuant the Taxpayer Delinquency and Amnesty Act did not violate the Statute on Statute's proscription against retroactivity because failure to pay during the amnesty period was a future rather than past transaction.

2. Lombard Public Facilities Corp. v. Illinois Department of Revenue, No. 2005 MR 1505, Order (DuPage County May 4, 2006)

- Affirmed administrative decision that not-for-profit corporation formed by village to construct and operate a hotel and convention center did not qualify for the use tax exemption for governmental bodies.

Administrative pronouncements issued in 2006:

For Administrative Hearing decisions and Letter Rulings See
<http://tax.illinois.gov/legalinformation/>

For other Department of Revenue publications See <http://tax.illinois.gov/taxforms/>

We are unable to respond to your survey in the format provided. The Department declines to make nexus determinations in the context of Private Letter Rulings or General Information Letters because the amount of information required to make those determinations is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to your readers in determining their tax obligations.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State. As a courtesy to the customer, this type of retailer may voluntarily register to collect and remit Illinois Use Tax on behalf of the customer.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Sincerely,

Samuel J. Moore
Associate Counsel

SJM:msk